No. 08-263

In the Supreme Court of the United States

JOHN ALVIS JACKSON, JR. AND
LARRY ANDREW CAREY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

GREGORY G. GARRE
Solicitor General
Counsel of Record
MATTHEW W. FRIEDRICH
Acting Assistant Attorney General
PATTY M. STEMLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether employer contributions to a pension plan covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, become "assets of [the] * * * plan" within the meaning of 18 U.S.C. 664 when they are due to the plan even if they have not yet been paid.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Discussion 9
Conclusion 25

TABLE OF AUTHORITIES

Cases:

Bucci, In re, 493 F.3d 635 (6th Cir. 2007) 17
Cline v. *Industrial Maint. Eng'g & Contracting Co.*, 200 F.3d 1223 (9th Cir. 2000) 17
Englehart v. *Sage*, 235 P. 767 (Mont. 1925) 20
Factor v. *Laubenheimer*, 290 U.S. 276 (1933) 19
Grupo Mexicano de Desarrollo, S.A. v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999) 12
Gustafson v. *Alloyd Co., Inc*, 513 U.S. 561 (1995) 11
John Hancock Mut. Life Ins. Co. v. *Harris Trust & Sav. Bank*, 510 U.S. 86 (1993) 11
ITPE Pension Fund v. *Hall*, 334 F.3d 1011 (11th Cir. 2003) 17
Kalda v. *Sioux Valley Physician Partners, Inc.*, 481 F.3d 639 (8th Cir. 2007) 14, 17
Luna, In re, 406 F.3d 1192 (10th Cir. 2005) 9, 16, 18
M&S Grading, Inc., In re, 541 F.3d 859 (8th Cir. 2008) 17
McKee v. *Paradise*, 299 U.S. 119 (1936) 12, 23
Mexican Nat'l R.R. v. *Davidson*, 157 U.S. 201 (1895) ... 13
Moore v. *United States*, 160 U.S. 268 (1895) 19

Cases—Continued: Page

Morrissette v. *United States*, 342 U.S. 246 (1952) 20
Pegram v. *Herdrich*, 530 U.S. 211 (2000) 24
Plunkett-Jarrell Grocery Co. v. *Terry*, 263 S.W.2d 229 (Ark. 1954) 20
Propper v. *Clark*, 337 U.S. 472 (1949) 14
Robinson v. *United States*, 30 F.2d 25 (6th Cir. 1929) 14, 20
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 14
Standard Oil Co. v. *New Jersey*, 341 U.S. 428 (1951) 13
United States v. *Andreen*, 628 F.2d 1236 (9th Cir. 1980) 20
United States v. *Grizzle*, 933 F.2d (11th Cir.), cert. denied, 502 U.S. 897 (1991) 22
United States v. *LaBarbara*, 129 F.3d 81 (1997) 8, 9, 17, 21
United States v. *Northway*, 120 U.S. 327 (1887) 19
United States v. *Panepinto*, 818 F. Supp. 48 (E.D.N.Y. 1993), aff'd, 28 F.3d 103 (2d Cir. 1994) . 17, 22
United States v. *Turley*, 352 U.S. 407 (1957) 19
United States v. *Uzzolino*, 651 F.2d 207 (3d Cir.), cert. denied, 454 U.S. 865 (1981) 21, 24
United States v. *Whiting*, 471 F.3d 792 (7th Cir. 2006) .. 22

Statutes and regulations:

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (29 U.S.C. 1001 *et seq.*) 2, 11
29 U.S.C. 1002(21)(A) 24

Statutes and regulations—Continued: Page

29 U.S.C. 1002(34) 3
29 U.S.C. 1031(a)(2)(A) (§ 111(a)(2)(A), 88 Stat. 851) 11
29 U.S.C. 1103 (2000 & Supp. V 2005) 8, 15
29 U.S.C. 1104(a) 15, 16
29 U.S.C. 1106 15
29 U.S.C. 1132(a) (2000 & Supp. V 2005) 11
29 U.S.C. 1134 11
29 U.S.C. 1135 11
29 U.S.C. 1137 11
Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* 14
Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, § 17(a), 76 Stat. 41 11
18 U.S.C. 371 2
18 U.S.C. 664 ..... *passim*
18 U.S.C. 669 2
18 U.S.C. 1027 2
18 U.S.C. 1343 2
18 U.S.C. 1344 2
29 C.F.R. 2510.3-101 11
29 C.F.R. 2510.3-102 ..... 11, 13

Miscellaneous:

Black's Law Dictionary:
(5th ed. 1979) 14
(8th ed. 1999) 19

Miscellaneous—Continued: Page

DOL Advisory Op.:
No. 92-22A (Oct. 27, 1992) 12
No. 93-14A (May 5, 1993) 12
No. 94-31A (Sept. 9, 1994) 12
No. 2005-08A (May 11, 2005) 12
Employee Benefits Sec. Admin., U.S. DOL, *Field Assistance Bulletin 2008-1* (Feb. 1, 2008) 13, 14, 16
Wayne R. LaFave & Austin W. Scott, *Criminal Law* (2d ed. 1986) 19
Restatement (Second) of Torts (1965) 20, 22, 23
Restatement (Second) of Trusts (1959) 12
63C Am. Jur. 2d *Property* (1997) 13

In the Supreme Court of the United States

No. 08-263

JOHN ALVIS JACKSON, JR. AND
LARRY ANDREW CAREY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-36) is reported at 524 F.3d 532. The memorandum opinion of the district court denying petitioners' post-trial motion for an acquittal and a new trial (Pet. App. 37-58) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2008. A petition for rehearing was denied on May 27, 2008 (Pet. App. 1). The petition for a writ of certiorari was filed on August 25, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Virginia, petitioners were convicted on two counts of bank fraud, in violation of 18 U.S.C. 1344; five counts of wire fraud, in violation of 18 U.S.C. 1343; one count of making false statements in a document required by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, in violation of 18 U.S.C. 1027; two counts of theft from ERISA-covered pension plans, in violation of 18 U.S.C. 664; and one count of theft from a health care benefit program, in violation of 18 U.S.C. 669. Pet. App. 3. Petitioner Jackson was also convicted of conspiracy to commit those offenses, in violation of 18 U.S.C. 371. Pet. App. 4. Petitioner Jackson was sentenced to 108 months of imprisonment, and petitioner Carey was sentenced to 87 months of imprisonment. *Ibid.* The court of appeals affirmed. *Id.* at 2-36.

1. Petitioner Jackson was the President and Chief Executive Officer of the Burruss Company (Burruss), a wood products business with its headquarters in Galax, Virginia, and manufacturing plants in Virginia, Tennessee, and Kentucky. Pet. App. 5. Petitioner Carey was Burruss's Chief Financial Officer. *Id.* at 6. Burruss maintained for its employees an ERISA-covered money purchase pension plan sponsored by the company (company plan) and an ERISA-covered money purchase pension plan sponsored by a labor union (union plan). *Id.* at 12. Crestar Bank (later SunTrust) was the trustee for both plans. *Id.* at 14. Burruss was the plan administrator for the company plan, and Carey was an assistant to the plan administrator. Carey was also plan administrator for the union plan. *Id.* at 13.

The company plan was an individual account plan, funded by employer contributions, which were allocated to accounts within the plan for each eligible participant. Pet. App. 12; see 29 U.S.C. 1002(34). Each year, Burruss was obligated to contribute to the plan three percent of the aggregate annual compensation of all eligible participants. Pet. App. 12. Burruss was required to allocate and credit the annual employer contributions to the proper participant accounts and to provide each plan participant with an annual account statement, as of the last day of the calendar year. *Id.* at 12-13.

The union plan also required Burruss to establish a bookkeeping account for each employee, to add to each account the participant's share of Burruss's annual plan contributions, and to prepare a participant statement after completing the allocations for the valuation date at the end of the plan year. Pet. App. 13. The plan defined the valuation date as the last day of the plan year, and it defined the plan year as the twelve consecutive months ending on December 31. *Ibid.* Burruss was required to contribute and to allocate to the account of each eligible participant an amount equal to 15 cents for each hour of service by that participant. *Ibid.*

In the mid-1990s, Burruss negotiated a loan agreement with Fleet Capital Corporation (Fleet) that keyed Burruss's borrowing capacity to its assets and required that all of its assets be pledged as collateral for the loan. Pet. App. 6-7, 9. Shortly thereafter, Burruss began to encounter financial problems. *Id.* at 8-9. To hide Burruss's deteriorating financial condition, make the company more attractive to potential buyers, and enrich themselves, petitioners began inflating Burruss's assets on reports filed with Fleet so that they could obtain more funds under the loan. *Id.* at 10-11, 19. Petitioners

also sold assets owned by Burruss but pledged to Fleet as collateral and deposited those proceeds into a secret bank account from which they wrote checks for their personal use. *Id.* at 11.

At the same time, petitioners intentionally failed to make payments that Burruss owed to its pension plans and lied about the missing payments. Pet. App. 14-16. In particular, as of December 31, 1998, Burruss owed approximately $322,000 to the company plan for calendar year 1998, but petitioners failed to make that payment when due. *Id.* at 14. On October 15, 1999, even though the 1998 contribution still had not been made, Burruss filed with the Department of Labor (DOL) a Form 5500, signed by petitioner Jackson, stating that the contribution had been made. *Ibid.* After repeated requests from the plan trustee, petitioners eventually made the 1998 contribution, but not until April 18, 2000. *Id.* at 14-15.

For plan year 1999, Burruss was obligated to contribute more than $324,000 to the company and union plans. Pet. App. 15. Jackson and Carey were aware that the payments were due, at the latest, by September 15, 2000. *Id.* at 15-16. As the due date approached, a representative of the plans' trustee repeatedly reminded Carey that the payments were due. *Id.* at 16. Although Carey assured her that Burruss would make the payments, it never did. *Ibid.* After Burruss failed to make the payments, the trustee's representative, Sybill Wolf, contacted petitioners several times to inquire about the payments. *Ibid.* Jackson directed her to speak to Carey, who generally avoided the calls and, when he did respond, asserted that a mistake must have been made. *Ibid.* On October 18, 2000, the trustee sent a letter to Burruss noting that the company had not made the pay-

ments and that it could be penalized for that failure. *Ibid.*

Meanwhile, in early September 2000, the trustee had prepared and delivered to Burruss the individual account statements for both plans for calendar year 1999. Pet. App. 16. The account balances reported on the statements reflected that Burruss would make the 1999 contributions. After Burruss failed to make the contributions, the trustee issued new statements to the participants indicating that adjustments had been made to the individual accounts to reflect Burruss's failure to make the payments. *Ibid.*[1]

Burruss's financial condition continued to deteriorate throughout the fall of 2000. Pet. App. 18-19. On November 7, 2000, after all efforts to sell the company failed, Burruss declared bankruptcy. *Id.* at 19.

2. In September 2005, a grand jury in the Western District of Virginia returned an indictment against petitioners charging them with numerous offenses arising from the conduct described above. Pet. App. 4; C.A. App. 36-64 (Indictment). As relevant here, Counts 11 and 12 of the indictment charged petitioners with theft from an ERISA-covered plan, in violation of 18 U.S.C. 664, based on their failure to pay the 1999 contributions to the company and union plans. C.A. App. 59-61.

Specifically, Count 11 charged that "the annual contribution owed by Burruss to the Company Plan for calendar year 1999 was an asset of the Company Plan";

---

[1] Burruss also maintained a health care plan for its employees. Burruss made weekly deductions from employees' earnings for contributions to that plan. In 2000, Burruss failed to transmit all of the withheld employee contributions to the plan. As a result, by October 2000, the plan ceased paying health care claims, resulting in substantial unpaid medical expenses for the covered Burruss employees. Pet. App. 17.

Burruss owed "an amount not less than $318,246.27" for plan year 1999; that contribution "was required to be paid on or before March 15, 2000, to the Trustee of the Company Plan, SunTrust Bank"; but "[t]hose funds were not paid by March 15, 2000 as required, and, in fact, were never paid." C.A. App. 59-60. Count 11 further charged that, "between on or about January 1, 1999 and on or about March 15, 2000," petitioners, "while fiduciaries of the Company Plan, did embezzle, steal and unlawfully and willfully abstract and convert to their own use, and to the use of others, an amount not less than $318,246.27, which constitutes moneys, funds, securities, premiums, credits, property and other assets of the Company Plan." *Id.* at 60. Count 12 made similar charges with respect to the 1999 contribution for the union plan, which was approximately $6,418.45. See *id.* at 60-61.

Petitioners pleaded not guilty and were tried before a jury. Pet. App. 4. The judge instructed the jury that, to find petitioners guilty of the charges under Section 664, the jury had to find that the government had proved three elements beyond a reasonable doubt:

> One: [petitioners] [fraudulently and] willfully embezzled, stole, or converted property, money, or funds to [their] own use or the use of another;
>
> Two: the property, money, or funds taken belonged to an employee benefit plan subject to ERISA;
>
> Three: that [petitioners] acted with the intent to deprive the pension plan of its funds, with reckless disregard for the interests of the pension plan.

C.A. App. 2220. The court further instructed the jury that "[m]onies, funds, securities, premiums, credits,

property, and other assets became assets of the [company and union plans] when they were due and payable to the trustee of the plans." *Id.* at 2222.

In its closing argument to the jury, the government argued that petitioners violated Section 664 because the 1999 contributions to the plans were "never paid" but were, "instead, converted to the use of another"—"the Burruss Company." C.A. App. 2253. The government argued that petitioners knew that they were required to make the contributions, "[b]ut this year money was tight. And they decided to keep the money for the Burruss Company[,] for them; not for the employees, not for the pension plan." *Id.* at 2254. Rather than make the contributions, the government observed, petitioners paid themselves bonuses and paid suppliers to keep the business going in an effort to sell it. *Id.* at 2255. When petitioners "chose to take the money owed to the pension plan * * * and to use it for something else," the government contended, "they converted it to the use of themselves or another." *Id.* at 2254-2255. The jury found petitioners guilty of the bulk of the charges against them, including the Section 664 offenses. Pet. App. 19-20.

After trial, petitioners renewed motions for acquittal that they had made during trial and sought, in the alternative, a new trial. Pet. App. 19-20. The district court denied the motions. *Id.* at 37-58. As relevant here, the court rejected petitioners' contention that the evidence was insufficient on the Section 664 charges because "Burruss' unpaid contributions were not assets of the plan." *Id.* at 47. The court concluded that it had correctly instructed the jury that "employer contributions became a plan asset when they were due and payable to the plan." *Id.* at 48. The court also rejected petitioner

Carey's contention that he had not converted the unpaid contributions to his own use, reasoning that Carey had helped "convert funds required to be paid to the Burruss pension plans to the use of the Burruss Company in order to prolong its appearance of solvency." *Id.* at 52.

The district court also rejected petitioner Jackson's contention that, even if the unpaid contributions were assets of the plans, he was not a fiduciary of the plans. Pet. App. 50. The court held that "[t]he plain language of the statute" makes clear that "a defendant need not hold any particular status as to the plan or be a fiduciary in order to be found guilty." *Ibid.*

3. The court of appeals affirmed. Pet. App. 2-36. As relevant here, the court rejected petitioners' claim that their convictions under Section 664 "must be vacated, as a matter of law, because 'unpaid employer contributions are not assets of a plan until they are paid into the plan unless the plan documents specifically state otherwise.'" *Id.* at 24 (quoting Pet. C.A. Br. 28-29). The court concluded that the district court had correctly "ruled that unpaid employer contributions become 'credits' and are ERISA 'plan assets' when they are 'due and payable to the plan.'" *Id.* at 25.

The court of appeals noted that "[Section] 664 does not explicitly provide that unpaid employer contributions constitute ERISA plan assets," but, the court stated, 29 U.S.C. 1103 "specifies that such assets are held in trust, and not for the employer's benefit." Pet. App. 26. The court further observed that the Second Circuit, in *United States* v. *LaBarbara*, 129 F.3d 81 (1997), had held that "an employer must comply with its contractual obligations to make contributions to its ERISA plan, and that such a contractual obligation constitutes an 'asset' of the ERISA plan." Pet. App. 26-27

(citing *LaBarbara*, 129 F.3d at 88, and *In re Luna*, 406 F.3d 1192, 1198-1201 (10th Cir. 2005)). The court of appeals then reasoned that, "[w]hen Burruss established its ERISA pension plans, it bound itself to the terms thereof," which required annual contributions. *Id.* at 27. The court noted that "Burruss could properly extricate itself from those ERISA obligations only by proper termination of the Plans." *Ibid.* Stating that it "agree[d] with the district court and the Second Circuit," the court of appeals held that "Burruss's unpaid contributions to the Plans constituted the 'moneys, funds, or assets' thereof for purposes of § 664." *Id.* at 27-28.

The court of appeals also rejected petitioners' related contention that they could not be convicted under Section 664 because they were not fiduciaries of the plans. Pet. App. 28-29. The court held that the district court had correctly ruled that Section 664 "plainly applies to 'any person' who steals or embezzles the moneys, funds, or assets of an ERISA plan." *Id.* at 28. The court of appeals noted that the jury instructions "did not mandate a jury finding that [petitioners] were fiduciaries." *Ibid.* Although the indictment had charged that petitioners were fiduciaries, the court concluded that the surplusage in the indictment was not reversible error because petitioners had not raised a variance or surplusage claim, the statute does not require fiduciary status, and the evidence established that petitioners were fiduciaries in any event. *Id.* at 28-30.

DISCUSSION

Petitioners contend (Pet. 5-12) that their Section 664 convictions should be reversed because unpaid employer contributions are not "assets" of an ERISA plan unless the plan documents provide otherwise. Although the

government argued in the courts below that unpaid employer contributions are plan assets, the government now agrees with petitioners after closer consideration of DOL's position on this issue and the other authorities discussed in this brief.

DOL's position—grounded in agency pronouncements going back at least 15 years—is that, absent provisions in plan documents giving the plan a beneficial interest in unpaid contributions, the contributions themselves are not assets of the plan until the contributions are paid to the plan. The plan's contractual right to the unpaid contributions, in contrast, is an asset of the plan once the contributions are due. The decisions of the courts of appeals have uniformly followed that rule, which is consistent with common-law principles. The decision below appears to depart from that rule, but, even if it could be interpreted, consistently with the decisions of other courts of appeals, as holding only that a plan's contractual right to payment is a plan asset, the government did not prove that petitioners "embezzle[d], st[ole], or unlawfully and willfully abstract[ed] or convert[ed]" that contractual right. 18 U.S.C. 664. Accordingly, this Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further proceedings in light of the position expressed in this brief.

1. a. Section 664 punishes "[a]ny person" who "embezzles, steals, or unlawfully and willfully abstracts or converts * * * any of the moneys, funds, securities, premiums, credits, property, or other assets of any * * * employee pension benefit plan, or of any fund connected therewith." 18 U.S.C. 664. Section 664 defines "employee pension benefit plan" to mean "any employee benefit plan subject to any provision of title I of

the Employee Retirement Income Security Act of 1974." *Ibid.*

Although Section 664 was originally enacted before ERISA, see Welfare and Pension Plans Disclosure Act Amendments of 1962, Pub. L. No. 87-420, § 17(a), 76 Stat. 41, it was amended by ERISA specifically to apply to ERISA-covered plans, see Pub. L. No. 93-406, § 111(a)(2)(A), 88 Stat. 851 (29 U.S.C. 1031(a)(2)(A)). Accordingly, Congress presumably intended plan "assets" to have the same meaning in Section 664 that the term has throughout ERISA. See *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995).

ERISA does not provide a definition of the "assets" of an ERISA plan. *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 89 (1993). DOL, which is charged with the administration and enforcement of Title I of ERISA, see 29 U.S.C. 1132(a) (2000 & Supp. V 2005); 29 U.S.C. 1134, 1135, 1137, has, however, addressed the meaning of plan assets in regulations and advisory opinions.

In addition to a general "plan assets" regulation concerning investments, 29 C.F.R. 2510.3-101, DOL has promulgated a regulation that specifically defines when *employee* contributions become plan assets. That regulation makes clear that amounts deducted from an employee's compensation for contribution to a plan become plan assets as soon as those funds "can reasonably be segregated" from the employer's general assets. 29 C.F.R. 2510.3-102(a). Neither regulation, however, addresses when *employer* contributions become plan assets.

DOL has consistently expressed the view that, in situations not covered by the plan asset regulations, "the assets of a plan generally are to be identified on the ba-

sis of ordinary notions of property rights under non-ERISA law." Advisory Op. No. 93-14A (May 5, 1993) (AO); see AO No. 2005-08A (May 11, 2005); AO No. 94-31A (Sept. 9, 1994); AO No. 92-22A (Oct. 27, 1992). The assets of a plan thus "include any property, tangible or intangible, in which the plan has a beneficial ownership interest," taking into account "any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved." AO 93-14A.

Accordingly, absent express contractual provisions indicating that the plan's beneficial ownership commences when contributions are due, employer contributions become assets of the plan only when they are actually paid to the plan. Under ordinary principles of property law, a company's failure to pay its contractual obligations when due does not give the creditor a property interest in the company's assets. A general creditor does not have any property interest in the assets of a debtor. See *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319-320 (1999). A debt is not a trust, and a debtor is not a fiduciary of the debt owed the creditor. See Restatement (Second) of Trusts § 12 (1959). Thus, as this Court held more than 70 years ago, an employer's failure to make contributions to an employee benefit plan generally does not give the plan "equitable title to or a lien upon any part of the employer's property. The assets of the employer remain[], as they were before, general assets." *McKee* v. *Paradise*, 299 U.S. 119, 122 (1936); see *id.* at 123 ("failure to pay * * * cannot avail to change the [company] into a trustee or enable the [plan] to obtain a preference

over other claims" against the company).[2] In accordance with those settled legal principles, DOL has taken the view that, as a general rule, "employer contributions become an asset of the plan only when the contribution has been made." Employee Benefits Sec. Admin., U.S. DOL, *Field Assistance Bulletin 2008-1*, at 1-2 (Feb. 1, 2008) (*FAB 2008-1*).

The fact that unpaid employer contributions are not themselves assets of the plan does not mean, however, that the plan obtains no property interest whatsoever as a result of the employer's contractual obligation. On the contrary, the contractual right to receive the contributions and the concomitant right to sue on the debt are themselves a property interest of the plan. Such rights have traditionally been referred to as "choses in action." See *Mexican Nat'l R.R.* v. *Davidson*, 157 U.S. 201, 204-206 (1895). "The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or sum of money from another, by action." *Id.* at 206 (citation omitted). "The terms 'choses in actions' and 'debts' are used by courts to represent the same thing when viewed from opposite sides. The chose in action is the right of the creditor to be paid, while the debt is the obligation of the debtor to pay." 63C Am. Jur. 2d *Property* § 22

---

[2] *McKee* involved funds that the employer had deducted from employee wages. 299 U.S. at 120. Such payroll deductions are now expressly addressed by DOL's employee contributions regulation, which, as discussed above, provides that employee contributions become plan assets as soon as the contributions are reasonably segregable from the employer's general funds. See 29 C.F.R. 2510.3-102(a). The common-law principles reflected in *McKee* still govern, however, with respect to employer contributions.

(1997). Choses in action are a form of intangible personal property. *Ibid.*; *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 439-440 (1951).

The text of Section 664 supports the conclusion that a plan's contractual right to employer contributions—its "chose in action"—is a plan "asset." Section 664 indicates that plan "assets" include "credits" of the plan. 18 U.S.C. 664. A "credit" is a chose in action —"[t]he correlative of a debt; that is, a debt considered from the creditor's standpoint, or that which is incoming or due to one[;] * * * [a] [c]laim or cause of action for [a] specific sum of money." *Black's Law Dictionary* 331 (5th ed. 1979) (*Black's*); see *Propper* v. *Clark*, 337 U.S. 472, 480 (1949) (stating that the "ordinary meaning" of "credit" is "the obligation due on accounting between parties to transactions"); *Robinson* v. *United States*, 30 F.2d 25, 28 (6th Cir. 1929) (stating that the term "credits," in a statute prohibiting theft or misapplication of bank funds, "refers to obligations or debts of others to the bank"). Thus, DOL has taken the view that, "when an employer fails to make a required contribution to a plan in accordance with the plan documents, the plan has a claim against the employer for the contribution, and that claim is an asset of the plan." *FAB 2008-1*, at 2.

b. DOL's position that employer contributions generally are not plan assets until paid, but the plan's contractual right to payment is itself a plan asset, is entitled to judicial deference. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that DOL's interpretations in opinion letters of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Kalda* v.

Sioux Valley Physician Partners, Inc., 481 F.3d 639, 647 (8th Cir. 2007) (finding "the Secretary's reasoning in its rulings regarding 'plan assets' thorough, valid, and particularly consistent). It also enjoys significant support in background principles of law that inform the interpretation of 18 U.S.C. 664.

Adopting the contrary view that unpaid employer contributions are always plan assets would have consequences that Congress could not have intended. If unpaid contributions were plan assets, ERISA's requirements would govern the normal operations of an employer's business whenever it failed to timely pay contributions. As soon as contributions were past due, an undifferentiated part of the employer's assets would become plan assets, and the employer would find itself in the unmanageable position of being a plan fiduciary in its general business activities. The employer would have to manage the funds constituting plan assets (and arguably the general accounts in which the funds were commingled) with undivided loyalty to plan participants and beneficiaries, rather than the company's shareholders. 29 U.S.C. 1104(a). The employer would have to refrain from self-dealing and transactions with parties in interest, including corporate affiliates and officers. *Ibid.*; 29 U.S.C. 1106. And the employer would have to comply with ERISA's other fiduciary provisions, such as the requirement that plan assets be held in trust and that they not inure to the benefit of the employer. 29 U.S.C. 1103 (2000 & Supp. V 2005). Concern about those potential consequences could discourage employers from participating in ERISA plans.

Moreover, if an employer's failure to pay its debts to a plan caused the employer to hold plan assets, then presumably any other debtor to a plan would likewise hold

plan assets if it was delinquent in paying its debt. Such a rule would likely discourage many valuable financial transactions between plans and third parties. Generally, when a party enters into a commercial transaction, it risks contractual liability for non-performance, but its general assets do not become impressed with a trust, and it remains free to pursue its business interests for the benefit of its partners or shareholders. If, however, unpaid debts to an ERISA plan caused the debtor to assume fiduciary status and to take on corresponding fiduciary duties and liabilities, many entities would avoid commercial transactions with plans on the same terms offered to less risky counter-parties.

DOL's interpretation of plan assets, under which the plan's asset in unpaid debts is limited to its contractual right to payment *(i.e.*, its credit or chose in action), avoids those far-reaching consequences. At the same time, it ensures that plan fiduciaries will pursue the plan's right to payment on the debts, because the fiduciary has an obligation to manage the chose in action prudently and in the interests of plan participants and beneficiaries. See 29 U.S.C. 1104(a); *FAB 2008-1*, at 2-3.

2. a. The decisions of the courts of appeals, with the possible exception of the decision below, accord with DOL's interpretation of when employer contributions become plan assets. The Tenth Circuit's decision in *In re Luna* provides the clearest explanation of the rule. The Tenth Circuit held that "an ERISA plan does not have a present interest in the unpaid contributions until they are actually paid to the plan." *In re Luna*, 406 F.3d 1192, 1199 (2005) (emphasis omitted). But the court further stated that, "although the plan does not possess the unpaid contributions themselves, it does possess the *contractual right* to collect them." *Id.* at 1200. That

"chose in action," the Tenth Circuit stressed, is itself "a property interest" of the plan. *Id.* at 1199.

The decisions of other courts of appeals are in accord. Those courts have recognized that "unpaid employer contributions are not assets of [an ERISA plan] unless the agreement between the [plan] and the employer specifically and clearly declares otherwise." *ITPE Pension Fund* v. *Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003); accord *In re Bucci*, 493 F.3d 635, 642 (6th Cir. 2007); see *In re M&S Grading, Inc.*, 541 F.3d 859, 865 (8th Cir. 2008) (stating that "unpaid [employer] contributions remained corporate assets and did not become assets of the plan"); *Cline* v. *Industrial Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir. 2000) (holding that, "[u]ntil the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation"); see also *United States* v. *Panepinto*, 818 F. Supp. 48, 51 (E.D.N.Y. 1993) (construing plan language stating that no "Employer shall have any legal or equitable right, title or interest in or to any sum paid by or due from the Employer" as vesting in the plan ownership of unpaid employer contributions) (citation omitted), aff'd, 28 F.3d 103 (2d Cir. 1994) (Table); cf. *Kalda*, 481 F.3d at 648 (holding that unpaid contributions were not plan assets because the plan documents did not obligate the employer to make the payments).

Other courts of appeals have also recognized that an employer's "contractual obligations" to ERISA plans "constitute[] 'assets' of the [plans]." *United States* v. *LaBarbara*, 129 F.3d 81, 88 (2d Cir. 1997); see *ITPE Pension Fund*, 334 F.3d at 1014 n.4 (stating that "[a] receivable is a contractual or legal claim for payment of

the money due, in contrast to the actual money due," and, although a receivable may be an asset of the plan, that fact does not make the *receivable property*, *i.e.*, "the actual money due," a plan asset).

b. The government did not fully address DOL's position and related authorities in its court of appeals brief in this case. And, perhaps due to the absence of a such a discussion, the decision of the court of appeals appears to have departed from the uniform approach of DOL and the other courts of appeals and incorrectly held that "unpaid employer contributions" are themselves "plan assets" when they are "due and payable to the plan." Pet. App. 25 (quoting district court opinion). See *id.* at 27-28 (holding that "Burruss's unpaid contributions to the Plans constituted the 'moneys, funds, or assets' thereof for purposes of § 664").

The precise holding of the court below is not entirely clear, because the court expressly relied on *LaBarbara*, which it correctly described as holding that an employer's "contractual obligation[] to make contributions to its ERISA plan * * * constitutes an 'asset' of the ERISA plan." Pet. App. 26-27; see *id.* at 27 (citing *In re Luna*, 406 F.3d at 1198-1201, for the proposition that a "contractual right to collect unpaid contributions is [a] plan asset"). Thus, it might be possible to read the decision below, consistently with other courts of appeals and DOL's position, as holding only that a plan's contractual right to unpaid employer contributions is a plan asset. That is not, however, the most natural reading of the decision, in light of how the case was charged and tried, and in light of the district court's conclusion that petitioners "convert[ed] *funds* required to be paid to the Burruss pension plans to the use of the Burruss Com-

pany in order to prolong its appearance of solvency." *Id.* at 52 (emphasis added).

3. Even if the decision below could be interpreted as holding only that a plan's contractual right to unpaid employer contributions is a plan asset, petitioners' convictions under Section 664 could not be sustained on the record before this Court, because the government did not prove that petitioners "embezzle[d], st[ole], or unlawfully and willfully abstract[ed] or convert[ed]" that contractual right. 18 U.S.C. 664.

a. "Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *Moore* v. *United States*, 160 U.S. 268, 269 (1895). "The words 'steal' and 'stolen' have no certain technical significance," but they are commonly used to embrace "any form of criminal taking" of property. *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933); accord *United States* v. *Turley*, 352 U.S. 407, 417 (1957). "[A]bstract" likewise "is not a word of settled technical meaning" but ordinarily "means to take or withdraw from." *United States* v. *Northway*, 120 U.S. 327, 334 (1887).

Conversion is the "willful interference, without lawful justification, with an item of property in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the property." *Black's* 356 (8th ed. 1999). "A conversion of property requires a serious act of interference with the owner's rights," such as "using it up, selling it, pledging it, giving it away, delivering it to one not entitled to it, inflicting serious damage to it, claiming it against the owner," or "unreasonably withholding possession of it from the owner." Wayne R. LaFave & Austin W. Scott, *Criminal Law* 730 (2d ed. 1986). "Conversion may in-

clude misuse or abuse of property" or "use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use." *Morrissette* v. *United States*, 342 U.S. 246, 272 (1952).

Section 664 thus prohibits the range of ways in which someone may wrongfully take or significantly interfere with the property of an ERISA plan, in an effort to "avoid gaps and loopholes between offenses." *Morrissette*, 342 U.S. at 273. "The essence of the crime is theft," which, in the context of pension plans, "includes a taking or appropriation that is unauthorized," if the defendant acts "with a fraudulent intent or a bad purpose or an evil motive." *United States* v. *Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980) (Kennedy, J.).

b. An ERISA plan's "credits," including its contractual right to employer contributions, can be embezzled, stolen, abstracted or converted in violation of Section 664 in a variety of ways. A defendant can violate the statute by taking the credit itself. For example, a third party might wrongfully attach the employer's debt to the plan, cf. *Englehart* v. *Sage*, 235 P. 767, 769 (Mont. 1925) (sheriff converted debt by wrongfully attaching it), or a plan fiduciary might fraudulently assign the plan's right to the employer contributions to himself or a third party. A defendant also can convert a plan's contractual right to employer contributions by "effectively prevent[ing] the exercise" of the right to collect the contributions. Restatement (Second) of Torts § 242(2) (1965) (Restatement of Torts). Cf. *Plunkett-Jarrell Grocery Co.* v. *Terry*, 263 S.W.2d 229, 233-234 (Ark. 1954) (holding that defendants converted plaintiff's accounts receivable by depriving him of the records necessary to collect them); *Robinson*, 30 F.3d at 29 (suggesting that bank officer would convert a bank's credit if he wrong-

fully extended the term of a customer's debt to the bank, thus "tying the hands of the bank for a definite period against action which might have been taken" to collect the debt). For example, a plan fiduciary would be guilty of conversion of a plan's contractual right to employer contributions if he caused the plan to refrain from collecting the contributions in exchange for a kickback from the employer. See *United States* v. *Uzzolino*, 651 F.2d 207, 209 (3d Cir.), cert. denied, 454 U.S. 865 (1981).

In *LaBarbara*, the Second Circuit held that the defendant converted an ERISA plan's contractual right to employer contributions based on a similar kind of interference with the plan's contractual right. LaBarbara was a union official who had negotiated collective bargaining agreements with an association of employers under which the employers were obligated to contribute to various union-sponsored ERISA plans. LaBarbara assisted Barone, the owner of one of the employers, in a "double breasting" scheme designed to evade Barone's obligations to the plans. *LaBarbara*, 129 F.3d at 83. Under that scheme, Barone created a second company that was not a signatory to the collective bargaining agreement, and Barone had that company pay a portion of his employees' wages, thereby concealing from the plans the existence of their right to certain contributions. *Ibid.* The Second Circuit held that Barone's "contractual obligations to the [plans] * * * constituted 'assets' of the [plans]," and LaBarbara aided and abetted Barone's violation of Section 664 by assisting him in "conceal[ing] [those] contractual obligations." *Id.* at 88.

c. In this case, however, the government did not prove at trial that petitioners embezzled, stole, abstracted or converted the ERISA plans' contractual rights to employer contributions. The government argued that

petitioners converted the assets of the plans because they knowingly failed to make Burruss's contributions to the plans when due and instead used Burruss's funds to support the company and to enrich themselves. See C.A. App. 59-61 (Indictment), 2253-2255 (government's closing argument to the jury); see also *id.* at 2218-2222 (jury instructions); Pet. App. 52 (district court opinion denying motion for acquittal on the ground that petitioners "convert[ed] funds required to be paid to the Burruss pension plans to the use of the Burruss Company").

Petitioners' conduct would have constituted a conversion of the plans' assets if the unpaid contributions were themselves plan assets. See *Panepinto*, 818 F. Supp. at 49-52; see also *United States* v. *Whiting*, 471 F.3d 792, 799-800 (7th Cir. 2006) (employer's agent converted plan assets when it failed to transmit *employee* contributions to the plan because those contributions were plan assets under DOL's regulation); *United States* v. *Grizzle*, 933 F.2d 943, 946-948 (11th Cir.) (same), cert. denied, 502 U.S. 897 (1991). But, as described above, unpaid employer contributions are not plan assets (absent a contractual provision to that effect), and petitioners' conduct did not constitute conversion of the plans' contractual rights to the contributions. Although petitioners reduced the funds that Burruss had available to satisfy the plans' contractual rights, petitioners did not take or impair the rights themselves. Petitioners' conduct also did not "effectively prevent[]" the plans from exercising their rights. Restatement of Torts § 242(2). Neither the failure to make the contributions nor the use of Burruss's funds for other purposes concealed the existence of Burruss's obligations or impeded the plans' trustee from taking action to enforce those obligations. Thus, petitioners' failure to pay the contributions when due

and their use of company funds for other purposes did not convert the plans' contractual rights to the contributions in violation of Section 664.

Any other conclusion would be contrary to the long-standing common-law rule that a debtor's failure to pay its debt does not constitute conversion. See *McKee*, 299 U.S. at 122 ("The bankrupt was a debtor which had failed to pay its debt. We know of no principle upon which that failure can be treated as a conversion of property held in trust."); Restatement of Torts § 242 cmt. f (noting the "prevailing view that there can be no conversion of an ordinary debt not represented by a document"). Moreover, if petitioners' conduct violated Section 664, then employers could be criminally liable any time they failed to make its ERISA contributions in a timely manner. If Congress had intended such a dramatic departure from common law principles and historical practice, it would have made that intent clear.

The evidence at trial also showed that petitioners lied to the plans' trustee about their intent to make the contributions and about whether they had made the contributions. In addition, petitioners misled plan participants by distributing account statements indicating that the contributions had been or would be made. See pp. 4-5, *supra*. Whether or not misstatements of that kind can interfere so significantly with a plan's exercise of its contractual right to contributions that they constitute conversion, petitioners' misstatements did not do so here. The trustee vigorously pursued the contributions despite the misstatements. The trustee sent Burruss a letter complaining about the failure to pay just a few weeks after the contributions were due, despite petitioners' lies to the trustee about whether the payments had been made. Pet. App. 14-16; C.A. App. 729-733. Bur-

russ filed for bankruptcy protection approximately three weeks later, Pet. App. 19, and, at that point, the plan could pursue its right to the contributions only through the bankruptcy process. Accordingly, the government failed to prove that petitioners converted ERISA plan assets in violation of Section 664.[3]

---

[3] If petitioners were acting as plan fiduciaries when they misled the plans' trustee and participants, petitioners' conduct might be analogized to the situation in *Uzzolino* where a plan fiduciary converted the plan's contractual right to employer contributions by intentionally causing the plan to refrain from collecting the contributions. See *Uzzolino*, 651 F.2d at 209. The government has not established, however, that petitioners were acting as fiduciaries, rather than as agents of the employer, when they made the misstatements about Burruss's intent to make its contributions. See *Pegram* v. *Herdrich*, 530 U.S. 211, 225 (2000) (under ERISA, a person may wear "two hats," one as employer and one as plan fiduciary, but he "wear[s] only one at a time," and he acts as fiduciary only when exercising fiduciary responsibilities). Generally, a person acts as an ERISA fiduciary only "to the extent" he actually exercises "authority or responsibility" over plan "assets" or "discretionary authority or discretionary control" in the plan's administration. 29 U.S.C. 1002(21)(A). And the government did not argue at trial that petitioners were fiduciaries, the jury was not instructed that it had to find that petitioners were fiduciaries in order to find them guilty of violating Section 664, and the courts below upheld petitioners' convictions based on the premise that Section 664 did not require proof that they were fiduciaries. See Pet. App. 28-29, 50-51; C.A. App. 2220-2222.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in light of the position expressed in this brief.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

MATTHEW W. FRIEDRICH
Acting Assistant Attorney General

PATTY M. STEMLER
Attorney

JANUARY 2009